WP(C) 3337/2005
BEFORE
HON'BLE MR. JUSTICE B.K. SHARMA

JUDGMENT AND ORDER

This writ petition has been filed alleging reservation beyond permissible limit towards promotion of the respondent No. 3.

2. The petitioner was first appointed as Lower Division Assistant (LDA) way back in 1968 (21.8.1968). Thereafter he was promoted as Upper Division Assistant (UDA) in 1984 (4.2.1984).

3. There are 4 promotional posts of Superintendent in the Department (Directorate of Sericulture). Which were filled up by seniormost persons (UDAs) on regular basis. A post of Superintendent had fallen vacant on 1.11.2000 due to retirement of the incumbent. According to the petitioner, he being senior to the respondent No. 3 and the total cadre strength being only 4, there is no question of providing any reservation by operating roster and consequently, it is the petitioner, who ought to have been promoted as Superintendent. Be it stated here that as per the seniority list annexed to the writ petition, the petitioner's position is at serial No. 3 as against the respondent No. 3's at serial No. 5. While the petitioner belongs to OBC community, the respondent No. 3 belongs to SC community.

4. Being aggrieved by the promotion of the respondent No. 3, the petitioner made Annexure-B representation dated 11.12.2002 followed by further representations on 1.4.2004 and 18.8.2004 forwarded by the Director to the Secretary to the Government of Assam in the Textile & Sericulture Department on 25.10.2004.

5. The aforesaid representation dated 18.8.2004 forwarded on 25.10.2004 was preceded by the Annexure-C notification dated 2.5.2003 providing promotions to the petitioner as a general category candidate alongwith three others, two of whom are of SC and ST(P) category and the remaining one of general category. By another notification issued on the same date, the respondent No. 3 was promoted as Registrar, next higher rank of Superintendent. Prior to that the said respondent was promoted as Superintendent by notification dated 31.3.2001.

6. Upon a reference to the aforesaid position, it is the case of the petitioner that having regard to the percentage of reservation provided for in the Assam Scheduled Castes and Schedule Tribes (Reservation of vacancies in Services and Posts) Act, 1978 and Assam Scheduled Caste and Schedule Tribes (Reservation of vacancies in Services and Posts) Rules, 1983, the total cadre strength of Superintendent being only 4, the said percentage cannot provide any reservation so as to operate the roster of reservation. Plainly stated it is the case of the petitioner that, there cannot be any reservation in a cadre of only 4 posts. Consequently, the respondent No. 3 could not have been promoted as Superintendent with further promotion as Registrar as SC category candidate.

7. I have heard Mr. B. Sarma, learned counsel for the petitioner as well as Mr. N. Nath, learned counsel representing the respondent No. 3. I have also heard Ms. R. Chakraborty, learned Additional Sr. Govt. Advocate, representing the official respondents. Mr. K. Paul, learned counsel was requested to assist the Court in the matter, which he readily agreed. I have also heard him.

8. As per the 20 point roster indicated in the schedule to the Act of 1978, the 1st, 2nd, 3rd and 4th vacancy are to be filled up by ST(P), unreserved, SC and unreserved category candidate respectively. The roster will operate within the percentage of reservation prescribed, which is 7 % for SC, 10 % for ST(P) and 5% for ST(H). Applying this percentage, 7%, 10% and 5% of 4 posts comes to .28,

.40 and .20 respectively. With this simple calculation, the admissible percentages of reservation against 4 posts of Superintendent do not constitute any post for any of the reserved category candidates.

9. As has been held in R.K. Sabharwal Vs. State of Punjab reported in (1995) 2 SCC 745, the percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. The concept of vacancy has no relevance in operating the percentage of reservation. By now, it is well accepted principle of reservation that the reservation cannot exceed the ceiling limit of 50%. The Government has to apply the cadre strength as a unit in the operation of roster in order to ascertain whether a given class/group is adequately represented in service. The cadre strength as a unit also ensures that the upper ceiling limit of 50% is not violated. Further, the roster is to be post specific and not vacancy based.

10. In the case of M. Nagaraj Vs. Union of India reported in (2006) 8 SCC 212, the Apex Court observed thus:

82. Before dealing with the scope of the constitutional amendments we need to recap the judgments in Indra Sawhney and R.K. Sabharwal. In the former case the majority held that 50% rule should be applied to each year otherwise it may happen that the open competition channel may get choked if the entire cadre strength is taken as a unit. However, in R.K. Sabharwal this Court stated that the entire cadre strength should be taken into account to determine whether the reservation up to the quota limit has been reached. It was clarified that the judgment in Indra Sawhney was confined to initial appointments and not to promotions. The operation of the roster for filing the cadre strength, by itself, ensures that the reservation remains within the ceiling limit of 50%.

83. In our view, the appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that upper ceiling limit of 50% is not violated. Further, roster has to be post specific and not vacancy based.

96. the Constitution (Eighty- first Amendment) Act, 2000 gives, in substance, legislative assent to the judgment of this Court in R.K. Sabharwal. Once it is held that each point in the roster indicates a post which on falling vacant has to be filled up by the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled up by that category candidate alone then the question of clubbing the unfilled vacancies with current vacancies does not arise. Therefore, in effect, Article 16 (4-B) grants legislative assent to the judgment in R.K. Sabharwal. If it is within the power of the State to make reservation then whether it is made in one selection or deferred selections, is only a convenient method of implementation as long as it is post based, subject to replacement theory and within the limitations indicated hereinafter.

11. In R.S. Garg Vs. State of U.P. reported in (2006) 6 SCC 430, the Apex Court dealing with a similar situation in which there were 6 posts and the reservation was to be confined to 21%, held that if the roster was to be followed, 2 posts would be reserved for SC candidates, which is impermissible. In paragraph 40 of the judgment, the Apex Court observed thus:

We are not concerned with the reasonableness or otherwise of the percentage of reservation. 21% of the posts have been reserved for the Scheduled Caste candidates by the State itself. It, thus, cannot exceed the quota. It is not disputed that in the event of any conflict between the percentage of reservation and the roster, the former shall prevail. Thus, in the peculiar facts and circumstances of this case, the roster to fill up the posts by reserved category candidates, af

ter every 4 posts, in our considered opinion, does not meet the constitutional r equirements.

12. In Nair Service Society Vs. Distt. Officer, Kerala Public Service Commis sion reported in (2003) 12 SCC 10, the Apex Court noticing the prohibition of re servation in excess of 50% observed that the High Court's direction to KPSC to a dvise more names from the supplementary lists of reserved category candidates fo r appointment was per incuriam, violative of statutory rules as also Articles 16 (4) and 16 (4-B) of the Constitution.

13. In State of U.P. Vs. Pawan Kumar Tiwari reported in (2005) 2 SCC 10, the Apex Court dealing with the rule of rounding off observed that the same based on logic and common sense is, if part is one half or more, its value shall be i ncreased to one and if part is less than half then its value shall be ignored. I n the instance case, the percentage of reservation being only .28, .40 and .20 r espectively, there is no question of taking its value as 1, rather the same is t o be ignored.

14. This Court in Manoj Kumar Roy Vs. State of Assam reported in 1998 (2) GL T 421 under similar circumstances held that the percentage of reservation being below the minimum fraction required, the SC candidate was not entitled to get ap pointment as a reserved category candidate.

15. In State of Punjab Vs. Harcharan Singh reported in (1998) 4 SCC 01, the question before the Constitution Bench was, whether in a single cadre post, rese rvation for SC, ST and OBC's can be applied either directly or through the roste r, in which vacancies are rotated amongst general category and reserved category candidates. The Apex Court observed that in a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a si tuation where such a single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general me mbers of the public, which is impermissible. This principle is equally applicabl e to the case in hand where the cadre of Superintendent consist of only 4 posts. This being the position, the argument advanced by the learned State Counsel as well as by the learned counsel for the respondent No. 3 that by operation of ros ter, reservation will have to be applied cannot be accepted.

16. In view of the above, I am of the considered opinion that the respondent No. 3 could not have been promoted within the permissible limit of percentage o f reservation because of which he has scored a march over the petitioner in the matter of promotion as Superintendent and Registrar. Consequently, the writ peti tion is allowed, with the direction to consider the case of the petitioner for p romotion both to the ranks of Superintendent and Registrar without any intervent ion of promotion of reserved category candidates, more particularly the promotio n provided to the respondent No. 3. He shall be so considered for promotion from the due dates with notional benefits.

17. The writ petition is allowed. There shall be no order as to costs.

18. Before parting with the case records, I place on record my words of appr eciation for Mr. K. Paul, learned counsel, who readily accepted the request to a ssist the Court, for his valuable and laudable efforts and assistance in the mat ter.